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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 IN RE: TERRORIST ATTACKS ON
4 SEPTEMBER 11, 2001

03 MD 01570 GBD SN

5 -----x
6 May 13, 2019
7 Before:
8 HON. SARAH NETBURN,
9 U.S. Magistrate Judge

10 APPEARANCES:

11 PLAINTIFF EXECUTIVE COMMITTEE
12 BY: STEVEN R. POUNIAN, Esq.
13 SEAN P. CARTER, Esq.
14 ROBERT T. HAEFELE, Esq.
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24 GEOFFREY S. BERMAN,
25 United States Attorney for the
Southern District of New York
SARA NORMAND,
JEANNETTE VARGAS,
Assistant United States Attorneys

Also Present Telephonically
ROBERT KRY, Esq.

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1 (Teleconference in Open Court)

2 THE COURT: Good morning, everybody. Please be
3 seated.

4 (Case called)

5 THE COURT: I believe we have Mr. Kry from MoLoLamken
6 on the phone. Is that correct?

7 MR. KRY: Yes, your Honor.

8 THE COURT: Welcome. Welcome to all of the people who
9 are here in the gallery. I am always happy to have you in the
10 courthouse and the courtroom, so welcome.

11 The purpose of today's conference is one of
12 scheduling. So I have a letter from April 16th that was
13 updating me on the status of the FBI production, and I believe
14 that the FBI and the plaintiffs' executive committee have
15 differing views how we should proceed. I understand from this
16 letter that the plaintiffs' executive committee intends to file
17 one or more motions in connection with Department of Justice's
18 production.

19 Mr. Pounian, you will be taking the heat on this?

20 MR. POUNIAN: Yes, your Honor, at this point. Mr.
21 Carter is also going to have some things to say.

22 THE COURT: Make sure the microphone is close enough
23 so everyone in the room can hear.

24 MR. POUNIAN: We asked for this hearing because we
25 reached an impasse for the first time with the FBI regarding

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1 four witnesses that we requested documents regarding four Saudi
2 government employees who had ties to al-Bayoumi and al-Thumairy
3 in Southern California in the Year 2000.

4 We must bring this motion to compel with regard to
5 those four Saudi government employees as to whom we requested
6 documents, but there is also another question, your Honor, that
7 has been raised that seems to be percolating in the case now.
8 There is a serious question that we have as to whether the FBI
9 intends to produce any documents regarding the Saudi government
10 employees who worked with al-Bayoumi and al-Thumairy to provide
11 assistance to the 911 hijackers.

12 I wanted to raise with your Honor the various issues
13 that we see that are now coming to the fore in the case because
14 we reached a point where there are potential impasses that are
15 about to happen, and we need to hear from the FBI regarding
16 those. We feel like there has been a lot of delay in the case,
17 delay in terms of a response on certain key issues in the case,
18 first and foremost of which is the 2012 FBI report.

19 If I may, your Honor, if I could pass this up to the
20 court?

21 THE COURT: This is the report that was referenced
22 when we appeared together and there was a question whether it
23 was going to be produced in an unredacted form?

24 MR. POUNIAN: That's correct, your Honor. It is on
25 the third tab, the tab of this group of documents. Your

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Honor's familiar with this report. We had discussed it before, and if we go to the third tab, there is a document, it is a four-page document, and on the third page is a synopsis of the subfile investigation, your Honor. The name of that subfile investigation is blank. It is classified, and on this page it refers to that subfile investigation name three times.

We're not interested in the name, your Honor, but we are interested in the particular information regarding this investigation, and it says the main subjects of this investigation, which is any individuals known to have provided substantial assistance to the hijackers. The name of the individuals is al-Thumairy, al-Bayoumi, who your Honor is already familiar with, and a third and possibly fourth person, so there is a third man there that is listed that is the subject of our discovery. We have been asking for over a year for an unredacted copy of this report.

On the final page of the document and in the very final paragraph, it has the information regarding this third man as to whom the information is still being withheld from production.

It says that this third person had some contacts with al-Bayoumi, and also there is evidence that this person tasked al-Thumairy to meet with assisting the hijackers. We believe, your Honor, this third person is a Saudi government official, superior to al-Thumairy and al-Bayoumi, and we have been asking

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1 for this document for over a year, as I said.

2 THE COURT: May I stop you for a second. You said,
3 "We're not interested in the name." What name is it you're not
4 interested in?

5 MR. POUNIAN: The name of the investigation. They
6 classified, on Page 3 it says synopsis of -- blank. That is
7 the name of whatever the FBI has assigned to this particular
8 investigation of Saudi government officials who provided
9 assistance to the hijackers. That is the code name, but we are
10 not asking for the code name. We're asking for the
11 information.

12 THE COURT: Thank you.

13 MR. POUNIAN: In the final paragraph I said we have
14 got the new copy of this document just a week ago from the FBI.
15 They produced an interim version of this to us, and in the
16 interim version there are essentially no changes from the
17 document that is before your Honor right now.

18 They have made on this final page, on the final key
19 page which provides the information regarding this third man,
20 there is no additional information that has been provided by
21 the FBI.

22 Now they have told us that this is an interim decision
23 that they've made and that they're waiting to make a final
24 decision, but the things they're citing that they need to make
25 a final decision on are approvals from a foreign government,

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1 and the only things that require approval in this document from
2 a foreign government have nothing to do with the final page of
3 the document. There are no approvals necessary. We know from
4 the codes on this document there are no approvals necessary
5 from a foreign government to release any of this information.

6 The decision is solely the decision of the FBI's, and
7 they have had over a year to make the decision, and we're still
8 waiting for that decision, and if the decision is no, we're not
9 going to release the information, we want to know that as soon
10 as possible so we can file a motion on this in addition to
11 those four other employees that I mentioned, your Honor, as to
12 whom they will not release any documents.

13 If I could turn, your Honor, to those four employees,
14 they were all Ministry of Islamic Affairs officials who worked,
15 who were in California and worked, one of whom was a superior
16 to al-Thumairy, three of whom worked under al-Thumairy and all
17 four of them had specific ties to al-Bayoumi during the key
18 period of time in late 1999 and 2000.

19 One of them was a superior of al-Thumairy named
20 al-Jraithen, who your Honor has heard about. He is the
21 gentleman who checked into a hotel with al-Bayoumi. He met up
22 with al-Bayoumi and checked into a hotel in December 1999,
23 three weeks before the hijackers arrived, and that was a hotel
24 a block away from the King Fahad Mosque where al-Thumairy
25 installed by Saudi Arabia as the Imam.

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1 We are interested in getting the documents the FBI has
2 as to al-Jraithen. There are two other gentlemen part of this
3 group of four. There is al-Sudairy and al-Sadhan, who your
4 Honor has already heard about before, and they worked under
5 al-Thumairy and they also had moved to San Diego during the
6 time of the relevant events where they were assisted by
7 al-Bayoumi and they moved into the same rooming house that the
8 hijackers lived in in San Diego.

9 So we have requested this information. The FBI has
10 completely refused to produce any documents regarding the four
11 individuals. Your Honor, there are other questions that we
12 have in addition to these four. We have asked for documents
13 regarding two officials at the embassy. One is Mussaed
14 al-Jarrah, and the other is Kalid al-Sowailem, and we have
15 questions. We have not seen any documents. They don't seem to
16 have any objection as to those two officials, who both had
17 contacts with al-Thumairy and al-Bayoumi. We haven't heard any
18 objection yet.

19 However, we haven't seen any of the key documents that
20 we would expect to find from the FBI in this case and we're
21 waiting. So we need to know are they going to produce those
22 documents regarding government officials?

23 In addition, there are other documents. This is an
24 investigation. The code name investigation is about Saudi
25 government officials, about al-Thumairy and this third man.

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1 This is a 1912 document. There are documents from each year
2 after that, not exactly like this document, but they're reports
3 that are prepared. There are trip reports and other
4 analytic-type documents that are ordinarily prepared by the FBI
5 in an investigation such as this. None of them have yet been
6 provided, and we don't even know whether they're in the
7 pipeline coming out from the FBI, whether they're reviewing
8 them.

9 So we need to make a motion about this, need a
10 straight answer from the FBI on the to 2012 report, whether
11 they'll going to release it or not, the final page, the key
12 information, and what is going on with the other embassy
13 employees and what is also going on with these other analytic
14 documents, other reports that the FBI is holding. That is the
15 basic point, your Honor. Thank you.

16 THE COURT: Thank you.

17 MR. CARTER: Just a few points.

18 Mr. Pounian has given you a lot of the specifics of
19 where we are now. I certainly want to take a step back because
20 I think this is dropped in the court's lap without a whole lot
21 of context. The background of this, the original FBI
22 investigation was the Pentagon Twin Towers bombing
23 investigation. Within the course of that investigation, the
24 FBI began in the first instance looking at al-Bayoumi,
25 al-Thumairy and others.

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Now, we would expect, based on normal FBI procedures, that sub-files would have been created within the Penttbom Investigation for subjects such as al-Bayoumi and al-Thumairy. Fast forward to 2007. The FBI opened a special subfile investigation to focus on whether or not the circle of conspirators who provided support to al-Hazmi and al-Mihdhar, the 911 hijackers, may have been broader than originally suspected.

We know about the subfile investigation, or first learned about it from a report called the 911 Review Commission Report that was issued in 2015. It explains specifically that this was an investigation focused on the circle of conspirators who helped al-Hazmi and al-Mihdhar in New York, and it identifies a number of people who are of high relevance to that investigation, specifically al-Bayoumi, al-Thumairy and others.

And to the point that Mr. Pounian just made in describing why Mr. al-Bayoumi is significant in the context of the subfile investigation, it specifically notes he assisted al-Hazmi and al-Mihdari as well as al-Sadhan and al-Sudairy during respective times in San Diego. From this report -- and you have this at Tab 2, your Honor -- from this report we know that al-Sadhan and al-Sudairy are relevant actors within the context of this subfile investigation based on their engagements with al-Bayoumi.

The 911 Review Commission Report, in turn, included a

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1 footnote referencing the 2012 summary report that your Honor
2 has before you, and at that time all we knew about the summary
3 report was that it included a specific quote that al-Thumairy
4 had immediately assigned a person to take care of al-Hazmi and
5 al-Mihdhar when they arrived in the United States, which was a
6 significant data point, advancement of the investigation now
7 having al-Thumairy identified in that way.

8 The 2012 summary report was then, your Honor, released
9 in 2016 in redacted form in response to a Touhy FOIA request
10 from a journalist. It then included the details Mr. Pounian
11 has described of both al-Bayoumi, al-Thumairy and an individual
12 who tasked the hijackers are known to have provided substantial
13 assistance.

14 That all leads us and led up to the issuance of the
15 five plaintiffs of the subpoena. We issued the subpoena within
16 a handful of days within the court's March 28, 2018 decision.
17 The subpoena included 10 demands. Four of those demands were
18 for specifically identified documents, individual documents.
19 One was the 2012 summary report. Six of the remaining demands
20 sought categories of documents, mostly documents from either
21 the Penttbom file, the subfile or other FBI investigative files
22 relating to al-Bayoumi, al-Thumairy, the King Fahad Mosque
23 where the hijackers received the assistance, al-Sowailem and a
24 few other folks.

25 In response, the FBI told us that this is far too

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broad, we could never possibly respond to this, and we entered into a series of negotiations where we attempted to modify the subpoena down. All of the modifications we offered were essentially unsatisfactory to the FBI and Department of Justice. What the FBI instead proposed, they would engage in a search for a subset of core documents relevant to the inquiry described in Pages 18 to 23 of the Court's March 28, 2018 decision.

We had considerable apprehension about that at the time till last summer when we were last discussing it because it is murky to us what exactly was happening. We don't know the criteria they are using to conduct the searches. We are not entirely clear what repositories are being searched. We are not really clear on the criteria that are being used to assess whether or not documents are relevant to the inquiry and the court's decision. We don't believe our discovery on the FBI is limited to the scope of discovery authorized of the kingdom under the Foreign Sovereign Immunities Act, a very different consideration.

We reached an impasse with regard to some specific documents and people that we know of we asked the FBI for. We likely also are going to be seeking some clarification about a few other issues.

One, we need some clarity about the methodology that the FBI is using to conduct these searches so we can understand

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1 a little bit better what it is using for search terms, how it
2 is going about identifying documents they produce so us, so we
3 have some capacity to challenge any deficiencies in
4 methodologies being employed.

5 We need to know whether or not all of the relevant
6 records related to al-Bayoumi, al-Thumairy and other principals
7 were migrated over from the original Penttbom file to the
8 subfile. We understand the FBI is looking essentially in the
9 subfile. If a lot of stuff was left behind in the Penttbom
10 investigation, there is potential that highly relevant
11 information is being excluded.

12 We know need to know where the FBI stands in this
13 process with some particularity. They have identified an
14 approach that they were willing to undertake. We just need to
15 know are searches still ongoing? How many documents are still
16 slated for review? And we need to have some sense of a
17 timeline for the FBI to complete its process because at the
18 end, the likelihood is that we're going to have some
19 disagreements potentially about objections the FBI has asserted
20 as basis for withholding documents, and we need to get to a
21 point in the process to litigate those as well.

22 We have the specific issues we reached impasse on now,
23 and also in the backdrop we have some of these questions about
24 methodology, timeline on those related issues we need to get
25 before the court. Thank your Honor.

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1 THE COURT: Thank you, Mr. Carter.

2 MS. NORMAND: Good morning, your Honor.

3 I think I would also like to start by stepping back a
4 bit, and I appreciate that counsel pointed the court to the
5 subpoena itself. It did seek basically 10 categories of
6 records, one of which was any and all records referring or
7 related to the work and investigation of the subfile team.

8 So while they did seek some specific records, they
9 sought an extraordinarily broad amount of records. As we had
10 indicated to the court and to the plaintiffs previously, the
11 subfile investigation is one that involves multiple subjects
12 and over a thousand serials, which is a term used to describe a
13 file which may, in turn, contain attachments. So we're talking
14 about an extraordinarily broad request.

15 As counsel also indicated, the investigation is a
16 classified investigation. Not only the name of the
17 investigation, but many of the subjects and the FBI's
18 activities in relation to that investigation are classified.
19 This really is an extraordinary request, that it is not an
20 ordinary civil discovery demand.

21 In response to the subpoena in May, we identified in a
22 lengthy document our objections to the subpoena and to the
23 Touhy request and provided an interim response. We did have
24 some discussions in which we asked for plaintiffs to
25 significantly narrow their request. They largely declined to

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1 narrow the request, and so what the FBI proceeded to do was to
2 identify a subset of records that the FBI believed to be
3 potentially relevant to the narrow issues on which the court
4 has authorized limited jurisdictional discovery of the Kingdom.

5 Those core records, as we sometimes call them,
6 included the 2012 report, it included portions of other
7 identified reports in the subpoena that pertain to al-Bayoumi
8 and al-Thumairy. It identified, it included various interview
9 reports, other kinds of records of a more analytical nature,
10 all of which were tied to the specific questions on which the
11 court had authorized limited jurisdictional discovery, and we
12 have been clear about that to the plaintiffs throughout.

13 The United States Attorney asked the FBI to conduct a
14 privileged and declassification review of those four records,
15 which has been ongoing since the fall. We have a team of
16 individuals from FBI headquarters as well as field personnel,
17 assisted by the U.S. Attorney's Office, that has been reviewing
18 documents line-by-line.

19 Most if not all of the records are classified records,
20 and so the materials that have been produced have had to be
21 reviewed line-by-line and produced through a process that
22 requires multiple layers of review to ultimately sign off by
23 through the declassification review procedures of the FBI.

24 We have now produced four tranches of records. The
25 first began in I believe it was November, and the most recent

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1 tranche of records was produced on May 1st. So far we have
2 produced 364 pages of records in redacted form. We withheld --
3 we, the FBI -- has withheld eight records in full. We provided
4 a privilege log with regard to the records that are withheld in
5 full, and the records that have been produced in redacted form
6 are coded with an accompanying heat that identifies the basis
7 for the redactions.

8 As for timing, we expect at least two further tranches
9 of records. It may be more than two, but there are essentially
10 two categories of records that remain to be processed. The
11 first is the remaining of the core records. Those include
12 certain evidentiary materials that the plaintiffs have sought.
13 They include portions of a joint intelligence report, an OIG
14 report, the portions of those reports that pertain to the
15 matters on which the court has authorized jurisdictional
16 discovery and some other records of a more analytical nature.

17 We don't have a firm time-frame to finish production,
18 but the FBI is going to do its best to complete review of those
19 records within 60 days. That is our firm goal. Sometimes
20 things come up that make it more difficult to do that. We have
21 learned that throughout this process.

22 I should add that some of the records involve equities
23 of other government agencies or foreign governments where
24 coordination is required for those outside of the FBI, and that
25 can take time. That said, the FBI is really hoping to complete

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1 its review of the core records, the subset of records, within
2 60 days.

3 The second category of records remain to be processed
4 are banking and phone records. With the court's permission, I
5 am going to let Ms. Vargas address that category of records and
6 our plan for those.

7 MS. VARGAS: Good morning, your Honor.

8 Plaintiffs have also requested, as Ms. Normand alluded
9 to, phone and banking records for certain individuals. We are
10 close to the end of our collection process for those records.
11 To date, we have gathered approximately 2500 pages of
12 responsive phone and banking records which we believe represent
13 the bulk of the records. We are still conducting some limited
14 supplemental searches in a few locations, but once we have done
15 that, then our search will at that point be complete.

16 It appears that many of these records have been
17 obtained by grand jury subpoena, which raises some
18 complications. Because these are grand jury records, they're
19 subject to the protections of Rule 6(e), and so we're unable to
20 turn those records over without obtaining a Rule 6(e) court
21 order.

22 Rule 6(e) requires that a petition for such an order
23 be filed in the court that originally issued the grand jury
24 subpoena. Because these records were obtained many years ago,
25 it has proven to be a little tricky to determine which courts

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1 issued which subpoenas for which records. We have been doing
2 that analysis, and we have located at least three jurisdictions
3 that have issued grand jury subpoenas with respect to these
4 relevant records, and we are attempting to determine if there
5 are other subpoenas issued, and we hope we will be able to
6 identify all such subpoenas, although ultimately we may not be
7 able to do so.

8 THE COURT: Would it be satisfactory, once you have
9 exhausted your efforts, to get a blanket order from me to
10 protect the FBI in the process more broadly?

11 MS. VARGAS: Yes, your Honor, that is our plan for
12 those records, for which we can't link a particular subpoena to
13 a particular set of records. Then we would hope we could come
14 to your Honor with those records and obtain a Rule 6(e) order
15 even if it's perhaps not exactly the procedure envisioned by
16 Rule 6(e) itself, but at this point that may be the only option
17 available.

18 With respect to the courts that we are are able to
19 identify the issuing jurisdiction, our current plan, if your
20 Honor approves, is to submit motions to transfer the venue of
21 those petitions to this Court pursuant -- and there is a
22 provision in Rule 6 that provides for that, it is Rule
23 6(e)(3)(G).

24 For example, if a grand jury subpoena was issued in
25 the Southern District of California, we can file a petition and

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1 a motion to transfer that petition to this Court, since the
2 records are sought for use in this judicial proceeding, and
3 that court can then transfer the petition here for your Honor
4 to issue the relevant Rule 6(e) order.

5 We assume at that point the PECs could support such a
6 motion and file papers in support of why those documents were
7 needed with respect to this litigation, which is a showing
8 obviously the FBI is not in the best position and the
9 plaintiffs are better.

10 THE COURT: Is that the most expeditious way to file a
11 motion for a transfer of the issue and then have this Court
12 rule on the merits rather than just file a motion in the first
13 instance in the issuing court?

14 MS. VARGAS: This is what their Rule 6(e) procedures
15 envision. There is a provision in Rule 6(e) that allows for a
16 court to authorize disclosure if the records are needed in aid
17 of a judicial proceeding, but there is a subpart that says if
18 the judicial proceeding is in another jurisdiction, in another
19 court, the court shall transfer the petition to the court which
20 has the judicial proceeding.

21 I think there are provisions that allow for the
22 originating court to have perhaps an advisory opinion if
23 needed, if there were some issues with the confidentiality that
24 one court wanted to advise the other court, but that is the
25 procedure that is set forth in the rules. That is why we were

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1 contemplating proceeding in that fashion.

2 THE COURT: Thank you. Ms. Vargas, how quickly, if
3 you identified at least three of the core issues, can we get
4 those motions to transfer up and running?

5 MS. VARGAS: Yes, your Honor, we are working on that
6 now, and so we hope to have motion papers fairly shortly, but
7 we are working on that in the short term.

8 THE COURT: They say beauty is in the eye of the
9 beholder. What is your, "fairly shortly"?

10 MS. VARGAS: In the next two weeks we hope to have
11 papers filed.

12 THE COURT: Yes, Ms. Normand.

13 MS. NORMAND: I would like to return to some of the
14 specific matters that Mr. Pounian raised.

15 I guess, first of all, I would begin with the four
16 individuals or perhaps five individuals he has identified. I
17 think it is important to make the point that three of those
18 individuals, as we understand them, Mr. al-Jraithen, Mr.
19 al-Sadham and Mr. al-Sudairy, are individuals as to whom this
20 Court has ruled are not a proper subject of jurisdictional
21 discovery. That was the basis for the FBI's position and is
22 the basis for the FBI's position that further searches for
23 documents related to those individuals are not warranted.

24 From the efficiency's response to the subpoena to the
25 request, we have made it clear that the court's limitations on

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jurisdictional discovery have guided the FBI's searches, and in our view it is not proper to ask the FBI or any government agency to search more broadly than the limits of jurisdictional discovery authorized by Judge Daniels and this Court, and that is the basis for the FBI's position that it would not conduct additional searches beyond the core records that it gathered last summer for those individuals.

As to the other two, search of those two individuals we understand are among those individuals as to whom the court has permitted discovery or at least there is no dispute as to that, and records concerning those individuals were part of the FBI's search, so the FBI has searched for records concerning those individuals. I will add, I believe the FBI has produced at least one record that refers to one of those individuals, although I don't want to go into detail in court because the documents themselves are subject to a protective order.

So that is the government's position, that the scope of discovery from the FBI which, of course, the United States is a sovereign as well, in addition to the foreign sovereigns and the state sovereigns, of course, but that discovery of the FBI should not be broader than discovery of the Kingdom itself.

The other piece is the 2012 summary report. As Mr. Pounian indicated, the FBI, at plaintiffs' request, has produced an interim version of that document. It has not yet made a final determination as to the document in part because

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1 there is information in the document that has to be coordinated
2 with a foreign government. Therefore, we don't believe
3 litigation is appropriate at this time with regard to that
4 document, but I would add, Mr. Pounian pointed you to the last
5 page of the document, and I believe the version he has
6 identified is the version that was produced under FOIA.

7 If you look, your Honor, there are codes on this
8 document that reflect the FOIA markings in the litigation per
9 the FOIA matter. They refer to B-1 and B-3. Now I am looking
10 at Page 3 and 4 of this document, and you'll see there are
11 redactions there, B-1 and B-3, on both pages. I believe these
12 are redactions Mr. Pounian has pointed out to the court. Those
13 redactions were litigated in a Freedom of Information Act
14 litigation that followed this FOIA request, and the court in
15 that case upheld the classification and the withholding of that
16 information as properly and currently -- as well as protected
17 from disclosure by the National Security Act, which is a
18 separate statutory protection in addition to classification.

19 That District Court decision is reported at 2017
20 WestLaw 746410, a 2017 decision from the Southern District of
21 Florida. There is currently an appeal pending on various
22 issues in that case, including I believe this document before
23 the 11th Circuit.

24 This is information that another court has previously
25 determined to be properly classified as protected from

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1 disclosure by statute. The FBI, nevertheless, reviewed this
2 document and at least at this time has determined the
3 information is not being declassified. However, I will add
4 that there are additional documents remaining in the last group
5 of core records that pertain to issues that overlap with the
6 2012 report, and our view is that the FBI should be permitted
7 to complete its review of those records, and then to the extent
8 that there is going to be litigation over withholdings
9 potentially to include this information in the 2012 report,
10 that it will be most efficient and most appropriate to wait
11 until the FBI has issued a final determination both as to the
12 2012 report and as to other documents, including the later
13 documents that remain to be reviewed, as I said, the FBI is
14 going to do its best to complete that review within 60 days.

15 Obviously, if there are roadblocks along the way, we
16 can advise the court, but that is the schedule that we envision
17 and we will try our best to articulate.

18 THE COURT: I think everybody is eager to get these
19 issues resolved, everybody in the courtroom.

20 Why would it not be efficient to work on parallel
21 tracks and so that the plaintiffs' executive committee can file
22 their motion? That will be on the assumption that they're not
23 going to be doing anything else. That will give the FBI the
24 benefit of their thinking as well why those documents are
25 necessary. We can schedule a briefing so that their brief is

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1 filed before your 60-day deadline, I'll call it, to produce
2 your final tranche of documents.

3 And then you'll have the opportunity to make a final
4 decision as to what you're producing, and to the extent you're
5 not producing all or some of the documents, you will then file
6 your opposition to the motion. It seems to me rather than wait
7 60 days, then have you say we're not producing everything, and
8 then set a schedule for the PECs, I would rather have them
9 working on this now, under the assumption they have all they're
10 going to get and maybe some of the issues will be mooted by
11 your conduct, but otherwise we'll move forward.

12 MS. NORMAND: I would say two reasons, your Honor:

13 First of all, we haven't yet had any opportunity to
14 meet-and-confer with the plaintiffs regarding -- they haven't
15 met and conferred with us regarding specific withholdings. We
16 obviously understand they're interested in this information
17 from the 2012 report, and certainly we understand why they're
18 interested in that, but as to any other documents that they are
19 interested in, we have not yet had those meet-and-confer
20 sessions. We don't know which documents they intend to
21 challenge the withholding of, which redactions they're
22 concerned with. These are things ordinarily parties would
23 meet-and-confer about before motion practice is filed.

24 Number two, the FBI needs to complete its review, and
25 if the plaintiffs make a motion to compel, we understand that

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1 the plaintiffs take the position that the United States would
2 need to assert the State Secrets Privilege in order to withhold
3 these documents in litigation. We don't necessarily agree with
4 that position. We believe that Touhy regulations and the
5 existing privileges and protections permit the government to
6 withhold the materials pursuant to Touhy regulations.

7 However, if ultimately the government needs to go
8 through that state secrets process, that is a lengthy process.
9 As the court may be aware, the State Secrets Privilege can only
10 be asserted by the head of the agency, which in this case would
11 be the Attorney General is the head of the Department of
12 Justice, of which the FBI is a component.

13 The privilege can only be asserted upon personal
14 consideration by the head of the agency of the documents or
15 information in question. There are procedures in place at the
16 Department of Justice that require, before the Attorney General
17 is to review a state secrets assertion, for a committee to
18 review and sign off on it.

19 Those procedures need to be followed in order to
20 assert the State Secrets Privilege in response to any motion to
21 compel, and those procedures should only be invoked once and
22 not piecemeal. The Attorney General should have an opportunity
23 to review all of the records that are potentially implicated
24 before making a final determination as to any privilege
25 assertion rather than doing it piecemeal.

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1 The FBI will not have completed its review until 60
2 days. That's certainly our goal. We wouldn't be in a position
3 to trigger the State Secrets process with regard to entirety of
4 the records until that review is completed. For those reasons,
5 we think it makes sense to put off a motion to compel until the
6 FBI has completed its process.

7 That said, I do think that there are issues that are
8 probably ripe for the court's consideration now. We believe,
9 for example, that the issues regarding the three individuals
10 who are mentioned, Mr. al-Jraithen and al-Sadham, Mr.
11 al-Sudairy, those are questions of the scope of discovery that
12 has been authorized by the court and its application to the
13 FBI. There the parties have reached an impasse, and to the
14 extent the plaintiffs PEC wish the FBI to conduct additional
15 searches, and the FBI has declined to do that given the court's
16 prior rulings on those individuals, those are issues that we
17 think make sense to brief now.

18 THE COURT: Thank you. Yes, Mr. Pounian.

19 MR. POUNIAN: Your Honor, I believe we got an answer,
20 I figure, if we would piece through that. I think they're not
21 going to produce the final page of the 2012 report. If that is
22 correct, your Honor, we should bring a motion to compel the
23 production of the final page of the 2012 report.

24 THE COURT: I thought I heard her say they were still
25 undergoing that review. It may ultimately be they're not going

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1 to --

2 MR. POUNIAN: They're undergoing a review because
3 they're getting approvals from a foreign government.

4 THE COURT: Correct.

5 MR. POUNIAN: The codes from the document that relate
6 to a foreign government don't have anything to do with the
7 final page of the document, and I may have -- I think I heard,
8 perhaps we could get an answer right now, are they going to
9 produce the final page unredacted of the 2012 report? That is
10 the question.

11 MS. NORMAND: Your Honor, that information has not
12 been declassified as of now. However, the report has not yet
13 been finally reviewed by the FBI, and so I am not in a position
14 to say the final determination has been made as to any portion
15 of the report that has not been released.

16 THE COURT: Can you answer whether or not the last
17 paragraph on Page 4 of the report, whether or not that, the
18 current status of that that you're awaiting a final, a final
19 decision by the FBI or whether or not you are awaiting a
20 decision by a foreign government?

21 MS. NORMAND: That portion is not related to the
22 foreign government coordination I discussed earlier. The
23 document as a whole has only been released in interim form at
24 plaintiffs' request. Among other things, we are waiting for
25 coordination of the foreign government.

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1 THE COURT: But just because the foreign government
2 hypothetically would say we are fine with you releasing
3 everything, that would not answer the question whether or not
4 you will release the last paragraph, is what Mr. Pounian is
5 most --

6 MS. NORMAND: That's right, that's right.

7 THE COURT: Is it fair to say that you are not
8 intending to release that final paragraph or that it is still
9 an issue for consideration?

10 MS. NORMAND: Your Honor, I cannot say today that a
11 final determination has been made as to that, and the reason
12 is, as I mentioned earlier, there are additional materials that
13 require approval, documents that overlap some of this
14 information, and so I expect that a final determination will be
15 made as to not only this document, but those other materials at
16 the same time. I am not in a position to say that a final
17 determination has been made even as to the last page of the
18 document. That said, I want to be clear, there has been no
19 decision to declassify that information at this time.

20 It may very well be ultimately the information is not
21 produced. I don't want to be unclear about that. I am not in
22 a position to tell the court or the plaintiffs that a final
23 determination has been made as to the document.

24 THE COURT: Is it your understanding -- what you just
25 said to me -- part of the determination whether or not to

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1 declassify this report will be informed by decisions about
2 other documents that are in the final tranche?

3 MS. NORMAND: I believe that is a fair
4 characterization, your Honor, because there are documents in
5 the final tranche that overlap reasonably some of the same
6 issues as this one.

7 THE COURT: Thank you.

8 MR. POUNIAN: Your Honor --

9 THE COURT: You have as much clarity as we can get.

10 MR. POUNIAN: -- I have to note we asked specifically
11 for this document over a year ago. I believe at the first
12 conference with your Honor last May, Mr. Carter spoke about
13 this report. There has been discussions about it for a year,
14 and yet we are now here with an interim version of it and still
15 wanting more detail on an issue that is critical and key and
16 goes right to the heart of the jurisdictional discovery in the
17 case. I don't think we're getting a straight answer at this
18 point, your Honor, but I'll move on to the next issue.

19 Last September after the subpoena, we gave the FBI a
20 list of eight witnesses, eight Saudi government employees as to
21 whom we wanted them to zero in and produce discovery. We gave
22 them certain facts regarding those witnesses, and they started
23 doing that process. They had two tranches in which they
24 provided some information, and then we learned just last month
25 that as to three of the people, we would get nothing. We hear

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1 now it is because of your Honor's ruling last November
2 regarding discovery with regard to the Kingdom.

3 Now, the question is, is there relevant information in
4 the FBI files relevant to this case? The plaintiffs don't have
5 the information. We are seeking discovery from the FBI. The
6 FBI investigated all these individuals. Each one of them has
7 ties to al-Thumairy and al-Bayoumi in California at the key
8 time of the key events. Two of them stayed in the same rooming
9 house with the hijackers.

10 So we believe it is critical to get this discovery,
11 and I understand there is a prior ruling of this Court with
12 regard to the Kingdom that we may seek to reconsider with your
13 Honor, but we need the information from the FBI in part to do
14 that. We don't have any other source of the information other
15 than from the FBI.

16 There is no reason for them to be holding back on a
17 subpoena from the plaintiffs in this case if they have the
18 information and it is relevant to the process here. I can't
19 tell you what is in the files there, but I know that the FBI
20 investigated each one of these three people, al-Jraithen,
21 al-Sadhan and al-Sudairy, because they had ties at the critical
22 time. Al-Jraithen came from Saudi Arabia to visit with
23 al-Bayoumi and with al-Thumairy and I believe to make the
24 arrangements for the hijackers to arrive three weeks later in
25 California.

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I believe it is critical information, and if they have documents about it, we ask them to be produced via a protective order to protect the information. I don't understand what prejudice there is to the FBI at this point.

Also with regard to the documents in this case, Ms. Normand said they're all classified. From what we understand, any document that mentions the name of the code name of the operation is classified automatically. It could be a document about a routine interview of a witness at a hotel. Every document that mentions the code name of the operation is classified automatically. Every document in this subfile investigation of Saudi government officials is necessarily classified simply because of that one title on the top of the document that has the name of the operation on it.

Now, the government says they produced 364 pages to date, and it has been over a year, your Honor. The production started, it was delayed and it started in November. We are aware from our own research that the government routinely produces in other litigation 500 pages a month up to 10,000 pages a month they can process, the FBI can process in response to other litigation. In the Hillary Clinton email litigation, they produced 500 pages a month, the same for the David Petraeus litigation.

Other cases, up to 10,000 per month when there has been a court order imposing that. We still don't know what is

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1 in the pipeline, your Honor, and that is what Mr. Carter
2 pointed out earlier that gives us pause because we don't know
3 exactly what they're going to produce, what they plan, what is
4 on the list.

5 So we have a lot of uncertainty and we're trying to
6 nail down as many things as we can because we don't want the
7 process to keep going and get rolled over into a situation
8 where we are left several months from now and there is a lot of
9 pressure to get things wrapped up when we don't yet have the
10 information and we have got to go to the Attorney General of
11 the United States to have him review documents. We would like
12 to get that done now.

13 THE COURT: It seems to me there are at least two ways
14 to proceed. One way would be to have a short briefing schedule
15 on the question of these three individuals and potentially on
16 the 2012 report. I understand the government hasn't made a
17 final determination, but we can proceed on the assumption that
18 its final determination is the same as its interim
19 determination and seek a ruling on that.

20 Or I think we can do "and/or," we can brief all of the
21 issues in an entire motion to compel. I am talking and
22 thinking at the same time. I guess based on what you just said
23 to me, my proposed schedule that I threw out to Ms. Normand
24 probably doesn't work for you.

25 What I had suggested was you file your motion in 45

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1 days, and that will give the government an opportunity to both
2 complete its final tranche and to get the benefit of your
3 authorities on some of the legal questions, and then they can
4 respond to the motion. Some issues might be mooted by the
5 production and otherwise they'll just respond to the motion.

6 I guess the question for you, notwithstanding your
7 desire to move as quickly as possible, which I share, is does
8 it make sense for you to file your full motion to compel until
9 you've received the final production, and if the final
10 production isn't coming for 60 days, then would you rather have
11 this preliminary motion on these individuals and potentially
12 the 2012 report and then set a deadline for production and then
13 turn around for your motion to compel?

14 MR. POUNIAN: A preliminary motion makes the most
15 sense, your Honor, because if we bring a broad motion to compel
16 now, we're going to be dealing with things we don't know, we
17 are not going to know the range of the production until it is
18 over, so I think there is going to have to be a motion at the
19 end of the production in any event if it is not satisfactory
20 because we don't know, we don't know what documents are in the
21 pipeline.

22 With regard to these individuals and with regard to
23 the 2012 report, I think we can file a motion, if that's your
24 Honor's decision?

25 MR. CARTER: Could I add one thing?

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I think Mr. Pounian is right, and I think it largely aligns with what Ms. Normand said. There are a range of objections that the FBI has indicated may be invoked with regard to documents. One is relevancy, which is the basis, as we understand it, for declining to respond to these three individuals. There are potential objections based on invocation of the Law Enforcement Privilege, the burden, and I don't think that we necessarily will have all the architecture around this to address these issues until we get towards the end of the process.

What I would believe would be the best course is for us to focus on the specific areas of impasse. We may seek leave to address the core methodology issue. One of the reasons we can't file an omnibus motion is we don't understand how they're going about deciding what is a core document that is going to be incorporated into the searches. So I think if we focused on those issues, we will advance the process considerably.

THE COURT: How quickly can you file a motion with respect to the three individuals and the report?

(Off-the-record discussion)

MR. CARTER: I am trying to figure out when we have agreed to be out of the country or a number of us out of the country on depositions. I think right about 30 days from now a number of us will be out of the country.

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1 THE COURT: Send a letter to us in the next two days.

2 MR. CARTER: In the 30, 45 days range when we would be
3 ready from then, your Honor?

4 THE COURT: Okay. I will take my leave from you on
5 that. I expected you to say more like 10 days from now is what
6 I expected you were going to say, so maybe that is not
7 possible, but I think you should be working on these motions
8 now. Who knows what is going to be produced in the final
9 tranche, but you have some sense, I think. You may not be
10 getting everything you want.

11 So we are going to do this in two phases, but I think
12 you're a team of lawyers. People should be working on these
13 motions now so that once the second tranche has been produced
14 and the parties have had an efficient meet-and-confer on that,
15 you can get that motion filed within a matter of weeks as
16 opposed to a matter of months. I think that should be
17 everybody's goal here.

18 So why don't we do the following: If you all can
19 meet-and-confer in the next 24 hours and get me a letter in the
20 next day or two with a proposed schedule for the first motion
21 to compel, which is going to be with respect to the three
22 individuals and the 2012 report, and you all should discuss a
23 briefing schedule. Again my thinking is it should be something
24 like a couple of weeks, a couple of weeks to oppose, and a few
25 days to file any reply, but I'll let you all try and work

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1 out -- the summer is coming.

2 MS. NORMAND: Your Honor, we have no objection,
3 obviously, to the plaintiffs filing on their schedule and the
4 court's schedule, but the government would, if the court is
5 anticipating the government would be potentially serving the
6 State Secrets Privilege in response to the motion to compel the
7 2012 report, that would require significant procedural work for
8 the Department of Justice.

9 It would be difficult and it would really be
10 impossible for us to respond on that two week time-frame if
11 that is what the court is envisioning. We can certainly
12 respond more quickly on the scope questions that the plaintiffs
13 have raised here with regard to the three individuals.

14 THE COURT: Can we do the following, because it sounds
15 like a States Secrets issue may be hung up in the larger
16 tranche and will need to be addressed then. Again I am talking
17 and thinking at the same time, which is never a great idea, but
18 can we hold off on the State Secrets argument, I can rule on
19 the other argument, and then if there is a States Secrets
20 objection, we can deal with that on a later today. It may be
21 they're not entitled to those documents for the reasons I
22 stated, the government is not required to produce them.

23 Is there any efficiency to that?

24 MR. CARTER: Your Honor, information would be provided
25 to us in the context of the State Secrets assertion that would

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1 inform our arguments in response to other positions, that would
2 be affidavits coming in that context that provide a certain
3 level of procedural protection that might inform the overall
4 arguments.

5 We do have some concern about segregating the State
6 Secrets from the other argument. One of the difficulties and
7 frustrations after we served the subpoena in April of last
8 year, we emphasized the 2012 report was the highest order of
9 priority in this process.

10 When we were before your Honor last year in October,
11 we were told that it was expected that it would be processed to
12 whatever determination in the second tranche before the end of
13 the year. It has slipped repeatedly, and mostly what we have
14 heard is there is a policy determination that needs to be made
15 with regard to that document. That has been true for a year,
16 and it has also been true for the related documents that
17 concern the same issues.

18 We would like to get to the point and have the
19 government go through its process to assert whatever grounds it
20 intends to invoke to withhold the document. We think that this
21 issue needs to be elevated up to the ultimate decision-maker
22 sooner rather than later.

23 THE COURT: All right. If you can't agree on the
24 process, send me your competing proposals with respect to these
25 four areas of discovery in that first motion to compel, and

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1 I'll issue a ruling. I will wait and see whether you all can
2 work out a proposed schedule. I would rather not wait.

3 MR. POUNIAN: May I add one more thing.

4 I had a chance to talk with co-counsel, and I think
5 three weeks would be sufficient for us to file the motion.

6 THE COURT: Okay. Let me give you guys an opportunity
7 to speak outside with the government and see if you can come up
8 with a schedule that works for everybody, but I think if we can
9 do it in three weeks, that will be certainly my preference.

10 MS. NORMAND: I ask for clarification. You referred
11 to four areas of discovery. Are you referring to the three
12 individuals and the 2012 report?

13 THE COURT: I am. I am going to order that the
14 government produce that final tranche within 60 days from
15 today. Hopefully, a court order will urge you. I agree the
16 plaintiffs' executive committee that we need to move that
17 process further along.

18 So today is May 13th, so that production will be due
19 on Friday, July 12th. Hopefully that will also help you all in
20 your effort with respect to the second motion that is
21 anticipated. So the plaintiffs' executive committee, to the
22 extent the government feels there has not been adequate
23 meet-and-confer with respect to the other documents that you're
24 seeking, this is also an opportunity to have that conversation
25 as well. It seems you have been speaking, and maybe not with

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1 specificity to the government's liking, so you can engage in
2 that process and I'll appreciate that as well.

3 Anything further?

4 MR. CARTER: No, your Honor.

5 THE COURT: For the public who is here, I want to
6 point this out to you. Behind you is a portrait of Louis
7 Freeh, who has served in many roles. He was a District Judge
8 in this Courthouse and this was his courtroom.

9 He was also the Director of the FBI during that period
10 of time, and so he no longer serves in either capacity. He is
11 a private citizen now doing legal work, but he was an FBI agent
12 and the Director of the FBI and a District Judge, and he was
13 also a former Assistant United States Attorney.

14 I was speaking with somebody about today's conference
15 just generally, and they pointed this out to me and noted that,
16 or told me the story that when Mr. Freeh was a young Assistant
17 United States Attorney, his first trial was in this courtroom.
18 The first person who testified was an FBI agent, it was in this
19 courtroom, and this was his courtroom when he was a District
20 Judge.

21 So he sat at the lawyers' table, he sat at the Judge's
22 Bench, and he sat in the witness box, wherever it is, all in
23 this courtroom. I thought it was appropriate, though it was
24 just coincidental we are having today's conference to talk
25 about FBI's productions in a courtroom where Mr. Freeh spent a

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1 lot of his professional career.

2 So I thought I would share all of that with you
3 because this courthouse has amazing history, and I hope you
4 take advantage of some of the public flyers and other spaces.

5 I know on the 5th floor there is a lot of information you can
6 learn a little bit more about the courthouse, but I thought I
7 would mention it because I was staring at Mr. Freeh and he was
8 staring at me, through that portrait. I thought you would
9 appreciate that story. With that, I will get a letter from the
10 parties in the next 24 to 48 hours and we'll get scheduled
11 going for this. Thank you.

12 (Court adjourned)

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